

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL ASBERRY,

Plaintiff,

CIV. S-04-2467 LKK PAN

v.

CITY OF SACRAMENTO, DOES 1-20
inclusive,

ORDER

Defendants.

—oOo—

The Honorable Lawrence K. Karlton has extended the discovery deadline to permit this court's consideration of plaintiff's motion to establish a reasonable expert witness fee.

The parties have filed a joint stipulation pursuant to E. D. Cal. L. R. 37-251. As oral argument is unnecessary to resolve this matter, the hearing scheduled for September 21, 2005, is vacated.

On August 17, 2005, defendant disclosed as one of its

1 experts Jay M. Finkelman, Ph.D., Interim Systemwide Dean,
2 Professor and Program Director of Alliant International
3 University's California School of Organization Studies. Dr.
4 Finkleman is an expert on employment practices and policies who
5 charges "a minimum fee of \$2000.00 for deposition or courtroom
6 testimony up to 4 hours; \$475.00 per hour thereafter."
7 Defendant's August 17, 2005, Disclosure of Expert Witnesses, at
8 pp. 1-2. Mr. Finkleman's hourly rate to his client for
9 consulting and document review is \$325.00. Id. For depositions
10 taken outside of Los Angeles, Mr. Finkleman's place of business,
11 he "has a minimum fee of \$2900 per day for up to six hours of
12 deposition testimony, \$475 per hour thereafter, plus travel time
13 and expenses." Defendant's August 23, 2005 Letter to plaintiff's
14 counsel, at pp. 1-2.

15 The parties resolved that plaintiff would depose Dr.
16 Finkleman in San Francisco on Friday, September 23, 2005, at 3:30
17 p.m., for a period of 60 to 90 minutes, following Mr. Finkleman's
18 attendance at a board of directors meeting at Alliant
19 University's headquarters. Thus, plaintiff is not required to
20 pay Mr. Finkleman's travel expenses or time devoted thereto.
21 However, Mr. Finkleman insists on a flat fee of \$2000 paid prior
22 to commencing his deposition. Plaintiff contends he should be
23 required to pay Mr. Finkleman no more than \$325 per hour of
24 deposition.

25 Upon a showing of "good cause," Fed. R. Civ. P. 26(c)
26 authorizes a court to protect a party from undue expense in

discovery. Expert fees must be "reasonable," as provided by Fed. R. Civ. P. 26(b) (4) (C) :

Unless manifest injustice would result, (I) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b) (4) (B) of this rule [includes depositions] the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

"What constitutes a 'reasonable fee' for purposes of Rule 26(b) (4) (C) lies within the Court's sound discretion." Edin v. The Paul Revere Life Insurance Company, 188 F.R.D. 543, 545 (D. Ariz. 1999) (noting lack of Ninth Circuit authority and citing 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d, § 2034 at 469-470 (2d ed. 1994)). "[T]hose cases addressing the issue have set forth seven factors to consider in determining the reasonableness of a fee: (1) the witness's area of expertise; (2) the education and training required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interests implicated by Rule 26." Edin, 188 F.R.D. at 546.

Dr. Finkleman holds a Ph.D. in Industrial/Organizational Psychology and an M.B.A. in Industrial Psychology. He is

1 licensed as an Industrial and Forensic Psychologist and is a
2 Certified Professional Ergonomist. He is widely experienced and
3 recognized as a professor, academic dean, manager and consultant.
4 He is also a litigation expert-he has been retained over two
5 hundred times, deposed over one hundred times and has testified
6 at thirty trials.

7 The discovery at issue requires Dr. Finkleman's
8 professional opinion whether defendant's articulated reason for
9 terminating plaintiff-failure to disclose his prior felony
10 convictions-was pretextual in light of plaintiff's successful
11 discrimination suit against defendant. Dr. Finkleman's opinion
12 will depend upon the facts relevant to plaintiff's tenure with
13 defendant as well the tenure of defendant's other employees with
14 criminal records. Dr. Finkelman's expertise in ergonomics is not
15 relevant to the issues presented in this case, which are neither
16 technical nor particularly complex. Rather, Dr. Finkelman is
17 relied upon to assess all the facts of this case and determine
18 what individual and institutional assessments led to plaintiff's
19 second termination.

20 Plaintiff has submitted the resumes of four individuals
21 whose expertise he asserts is comparable to that of Dr.
22 Finkelman: (1) Carolyn Langenkamp, a local attorney and forensic
23 expert in employment law, including discrimination and
24 retaliation claims, whose hourly rate is \$250; (2) Jan Duffy, an
25 attorney and consultant in employment and management matters,
26 including discrimination and retaliation, who has offices in San

1 Francisco and London and an extensive record of academic
2 achievements, publications and speaking engagements, whose hourly
3 rate is \$400 to \$450; (3) Craig Pratt, who holds an M.S.W. in
4 Administration and has been a forensic expert in human resources
5 management in 550 state and federal cases and 50 trials, whose
6 hourly rate is \$300; and (4) Brian K. Kleiner, Ph.D., M.B.A., a
7 professor of Human Resource Management at California State
8 University, Fullerton who has provided consulting services to
9 more than 100 organizations and expert testimony in over 40
10 trials, whose hourly rate is \$295.

11 The court finds the expertise of these individuals
12 comparable to that of Mr. Finkelman as required by the facts of
13 this case. Imposition of a flat fee is unreasonable under these
14 circumstances. "Because a flat rate fee by its nature assumes
15 that the expert will devote an approximately equal amount of time
16 and skill for one event as another, the Court must examine the
17 proposition with respect to the particular case in front of it to
18 see if there is a rational basis for such a fee. . . . Some
19 [depositions] may last an hour, some may last days. For this
20 reason, a flat rate fee is not normally reasonable." Massasoit
21 v. Carter, 227 F.R.D. 264, 267 (M.D.N.C. 2005). Plaintiff has
22 agreed to meet Mr. Finkelman at the end of a business day for no
23 more than two hours. This limited time frame together with Mr.
24 Finkelman's ability to pursue his normal course of business until
25 mid-afternoon renders a flat fee unreasonable.

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1 I conclude the reasonable fee for Mr. Finkelman's
2 deposition is \$325 per hour, the rate he charges his client for
3 consulting and document review.

4 Accordingly, plaintiff's motion is granted. Prior to
5 commencing Mr. Finkelman's deposition, plaintiff shall pay Mr.
6 Finkelman \$325 for the first hour of questioning; should the
7 deposition exceed one hour, plaintiff shall pay Mr. Finkelman at
8 the conclusion of the deposition the proportionate amount due.

9 So ordered.

10 Dated: September 21, 2005.

11 /s/ Peter A. Nowinski

12 PETER A. NOWINSKI

13 Magistrate Judge
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